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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 692 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GAFARKKHAN @ JADUGAR SATTARKHA PATAHN
Versus
STATE OF GUJARAT

Appearance:
MR BS PATEL for Appellant
MR KT DAVE, APP for Respondent

CORAM : MR.JUSTICE B.C.PATEL
and
MR.JUSTICE A.L.DAVE

Date of decision: 09/08/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

#. This Criminal Appeal arises out of the judgment and order rendered by Additional Sessions Judge, Vadodara on July 1, 1996 in N.D.P.S. Case No. 2/96, convicting the appellant-original accused no. 1 under Section 21 of the Narcotics Drugs & Psychotropic Substances Act (hereinafter to be referred to as "the NDPS Act") and sentencing him to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 10,000/- (in default to pay fine, to undergo further rigorous imprisonment of 3 years).

#. The facts of the case in nutshell can be stated thus. On December 5, 1995, Police Sub Inspector B.H. Patel while on patrolling duty received an information through an informer that one Gaffarkhan @ Jadugar Sattarkhan Pathan, resident of Subhash hutments keeps Charas and Brown Sugar in his house and sells the same and that the sale is going on. On receiving the said information, he informed the Police Inspector, Sayajiganj about the same. Police Inspector, Sayajiganj immediately telephonically informed the D.C.P., North Zone of Baroda City Police. An entry about this passing over of information was made in the Sayajiganj Police Station Diary being entry no. 24/95 dated December 5, 1995 at 21.05 hrs. As per the direction of the D.C.P. North Zone, Panch witnesses were called and after informing them about the purpose and the panch witnesses having expressed their readiness, raid was conducted with full preparations like plastic bags, sealing wax, thread, seal, envelopes etc. House of Gaffarkhan was cordoned and raid was conducted. Gaffarkhan was known to Police Constable Shantilal Valjibhai and therefore, he was nabbed. After following the procedure required under Section 50 of the NDPS Act, he was searched and 11 bags were found from the right side of pocket of his trouser containing Brown Sugar. Total weight thereof was 5.100 ml. From the left pocket of his trouser, currency notes worth Rs. 950/- were found. There was one lady namely Amirbibi - wife of Gaffarkhan in the said hut. In her presence, search of the hut was conducted and an old suitcase lying below the cot was found. Upon opening the suitcase, a plastic packet wrapped in old plastic was found containing about 12 grams of Charas. Muddamal was seized after following the due procedure. The accused was arrested and First Information Report was lodged. Further investigation was made and having found sufficient evidence against the accused persons, chargesheet was filed. The case was

made over to the Sessions Court and N.D.P.S. Case No. 2/96 was registered. Charge was framed at Exh. 4. Accused persons pleaded not guilty to the charge and claimed to be tried. Considering the evidence led by the prosecution, learned trial Judge came to a conclusion that the prosecution was successful in establishing the charges against the accused no. 1 and sentenced him as stated above. So far as the accused no. 2 - Amirbibi is concerned, it was held that the charges were not proved and therefore, she came to be acquitted.

#. We have heard the learned counsel Mr. B.S. Patel, appearing for the appellant and Mr. K.T. Dave, leaned APP appearing for the respondent - State. They have taken us through the evidence. We ourselves have considered the Record & Proceedings closely. We have also gone through the judgment and order impugned herein.

#. Only contention seriously pressed into service amongst other contentions raised by Mr. Patel is non-compliance of requirement of Section 42 of the NDPS Act by the investigating agency. We have examined the evidence in this regard. Admittedly, the information was received from an informer by P.S.I. Shri B.H. Patel, who has been examined at Exh. 9. He is the first informant. If his deposition is seen, he states that while on patrol duty, he received information about Gaffarkhan @ Jadugar Sattarkhan Pathan indulging in sale of Charas and Ganja and therefore, he informed Police Inspector Shri Girvansinh Kanaksinh Solanki, who in turn, telephonically informed the D.S.P. Smt. Miraben Verma. Section 42 of the NDPS requires that when an action is taken by an officer on information received by him, it is to be reduced into writing and has to be forthwith sent to his immediate official superior. This appears to have been not done even as per the say of this witness in his examination-in-chief. The defence has committed no ambiguity by putting a specific question to this witness in cross-examination where this witness has clearly admitted that he did not reduce into writing the information received by him from the informer and as such, there was no question of sending a copy thereof to his immediate official superior as contemplated under Sections 42 (1) and 42 (2) of the NDPS Act.

#. We have, now to examine the effect of such non-compliance. In this regard, the decision of the Apex Court in the case of State of Punjab v. Balbir Singh [AIR 1994 SC 1872] may be profitably be referred to. In that decision, the question whether requirement under Section 42(1) is mandatory or not was considered and it

was specifically held that requirement under Section 42(1) is mandatory. It was held that under Section 42(1) empowered officer if has a prior information given by any person that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offence under Chapter IV has been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief. To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

#. In view of this decision and in view of the fact that the mandatory requirement of Section 42 of NDPS Act has not been complied with, we find substantial force in the contention raised by Mr. Patel and the appeal deserves to be allowed on this ground.

#. At this stage, learned counsel for the appellant Mr. B.S. Patel does not press for verdict on any of other contentions.

#. Hence, this appeal is allowed. The judgment and order delivered by the Additional Sessions Judge, Vadodara in N.D.P.S. Case No. 2/96 is hereby quashed and set aside. The appellant Gaffarkhan Alias Jadugar Sattarkhan Pathan is acquitted of the charges levelled against him. He be set at liberty forthwith if not required in any other case. Fine, if paid, be refunded.

[B.C. PATEL, J.] [A.L. DAVE, J.]

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